II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 28 November 1997

concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services

(97/838/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57, 66, 90, 99, 100, 100a and 113, in conjunction with Article 228 (2) and the first subparagraph of Article 228 (3) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Whereas the Marrakesh Agreement establishing the World Trade Organization and its related agreements, the Ministerial Decisions and Declarations, including the Ministerial Decision on Negotiations on Basic Telecommunications, as well as the Annex on Telecommunications and the Annex on Negotiations on Basic Telecommunications were approved by Council Decision 94/800/EC of 22 December 1994 [3];

Whereas the overall commitments in basic telecommunications services negotiated by the Commission, on behalf of the European Community and its Member States, constitutes a satisfactory and balanced outcome;

Whereas on 30 April 1996 the Council authorized the Commission to approve, on behalf of the European Community and its Member States, the Decision of the Negotiating Group on Basic Telecommunications and the WTO Council for Trade in Services adopting the Fourth Protocol to the General Agreement on Trade in Services and the Decision of the Council for Trade in Services on Commitments in Basic Telecommunications;

Whereas on 14 February 1997 the Council authorized the Commission to submit to the WTO the final schedule of commitments on behalf of the European Community and its Member States;

Whereas the competence of the Community to conclude international agreements does not derive only from explicit conferral by the Treaty but may also derive from other provisions of the Treaty and from acts adopted pursuant to those provisions by Community institutions;

Whereas where Community rules have been adopted in order to achieve the aims of the Treaty, Member States may not, outside the framework of the common institutions, enter into commitments liable to affect those rules or alter their scope;

Whereas some commitments on basic telecommunications services fall within the competence of the Community under Article 113 of the Treaty; whereas, furthermore, other commitments on basic telecommunications services affect Community rules adopted on the basis of Articles 57, 66, 90, 99, 100 and 100a and may therefore only be entered into by the Community alone;

Whereas the use of Article 100 of the Treaty as a legal base for this Decision is justified also by the fact that the aforementioned commitments on basic telecommunications services are likely to affect Council Directive 90/434/EEC of 23 July 1990 on the common system of

[1] OJ C 267, 3. 9. 1997, p. 80.
[2] OJ C 339, 10. 11. 1997.
[3] OJ L 336, 23. 12. 1994, p. 1.

taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (1) and Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2), which are based on Article 100 of the Treaty;

Whereas, by their nature, the Agreement establishing the World Trade Organization and the Protocols to the General Agreement on Trade in Services, are not susceptible to being directly invoked in Community or Member States courts,

HAS DECIDED AS FOLLOWS:

Sole Article

1. The Fourth Protocol to the General Agreement on Trade in Services concerning basic telecommunications services is hereby approved on behalf of the European Community with regard to that portion of it which falls within the competence of the Community.

2. The text of the Fourth Protocol is attached to this Decision, as are also the following:

— the schedule of specific commitments of the Community and the Member States, which is part of the overall package of commitments reached at the WTO on 15 February 1997,

— the decision of the Council for Trade in Services on commitments in basic telecommunications, and

— the report of 15 February 1997 by the Group on Basic Telecommunications to the Council for Trade in Services.

3. The President of the Council is hereby authorized to designate the person(s) empowered to sign the Fourth Protocol to the General Agreement on Trade in Services in order to bind the Community with regard to that portion of the Protocol falling within its competence.

Done at Brussels, 28 November 1997.

For the Council

The President

G. WOHLFART

(1) OJ L 225, 20. 8. 1990, p. 1.
(2) OJ L 225, 20. 8. 1990, p. 6.

ANNEX (1)

FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES

Members of the World Trade Organization (hereinafter referred to as the 'WTO') whose Schedules of Specific Commitments and Lists of Exemptions from Article II of the General Agreement on Trade in Services concerning basic telecommunications are annexed to this Protocol (hereinafter referred to as 'Members concerned'),

Having carried out negotiations under the terms of the Ministerial Decision on Negotiations on Basic Telecommunications adopted at Marrakesh on 15 April 1994,

Having regard to the Annex on Negotiations on Basic Telecommunications,

Agree as follows:

1. Upon the entry into force of this Protocol, a schedule of specific commitments and a list of exemptions from Article II concerning basic telecommunications annexed to this Protocol relating to a Member shall, in accordance with the terms specified therein, supplement or modify the schedule of specific commitments and the list of Article II exemptions of that Member.

2. This Protocol shall be open for acceptance, by signature or otherwise, by the Members concerned until 30 November 1997.

3. The Protocol shall enter into force on 1 January 1998 provided it has been accepted by all Members concerned. If by 1 December 1997 the Protocol has not been accepted by all Members concerned, those Members which have accepted it by that date may decide, prior to 1 January 1998, on its entry into force.

4. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish to each Member of the WTO a certified copy of this Protocol and notifications of acceptances thereof.

5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this fifteenth day of April one thousand nine hundred and ninety-seven, in a single copy in the English, French and Spanish languages, each text being authentic, except as otherwise provided for in respect of the Schedules annexed hereto.

(1) The Annex is authentic in English, French and Spanish.

THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES — SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1. Cross-border supply 2. Consumption abroad 3. Commercial presence 4. Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
2.C **Telecommunications services** Telecommunications services are the transport of electromagnetic signals — sound, data image and any combinations thereof, excluding broadcasting (1). Therefore, commitments in this schedule do not cover the economic activity consisting of content provision which require telecommunications services for its transport. The provision of that content, transported via a telecommunications service, is subject to the specific commitments undertaken by the European Communities and their Member States in other relevant sectors.			
All sub-sectors			The European Communities and their Member States undertake additional commitments as contained in the attachment, all parts of which are equally binding.
	FIN: The general horizontal requirements for legal entities in GATS/SC/33 shall not apply to the telecommunications sector except as: — half of the founders, half of the members of the board of directors and the managing director must have permanent residence in the European Economic Area. If the founder is a legal person, it must have residence in the EEA.	FIN: The general horizontal requirements for legal entities in GATS/SC/33 shall not apply to the telecommunications sector. Requirements concerning the Åland islands shall continue to apply.	B: Licensing conditions may address the need to guarantee universal service, including through financing, in a transparent, non-discriminatory and competitively neutral manner and will not be more burdensome than necessary.
	1. None except for: P: basic services can be supplied only by companies established in Portugal. GR: access through SA and the company must be exclusively engaged in the supply of telecommunication services.	1. None	
	2. None	2. None	

Modes of supply: 1. Cross-border supply 2. Consumption abroad 3. Commercial presence 4. Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	3. None except for (*): GR: access through SA and the company must be exclusively engaged in the supply of telecommunication services. P: The direct or indirect participation of natural persons, who are non-nationals of EC Member States or non-EC companies or firms in the capital of companies supplying basic telecommunications services cannot exceed 25 %. F: Indirect: none. Non-EC natural or juridical persons may not hold directly more than 20 % of the shares or voting rights of companies authorised to establish and operate radio-based infrastructure for the provision of telecommunications services to the general public. For the application of this provision, companies or firms legally established according to the laws of a Member State of the EC are considered EC juridical persons.	3. None	P: The Government of Portugal has the intention of presenting to the Parliament draft legislation aiming at removing partially the present limitations on foreign equity participation in the capital of companies supplying basic telecommunication services no later than in 1998. In case of approval, the new legislation will be bound no later than in 1999.
	4. Unbound except as indicated in the horizontal section.	4. Unbound except as indicated in the horizontal section.	
Domestic and international Domestic and international services provided using any network technology, on a facilities based or resale basis, for public and non-public use, in the following market segments (these correspond to the following CPC numbers: 7521, 7522, 7523, 7524**, 7525, 7526 and 7529**, broadcasting is excluded):			
a. Voice telephone services b. Packet switched data transmission services c. Circuit-switched data transmissions services d. Telex services e. Telegraph services f. Facsimile services g. Leased circuit services	1. None except for (2): E: none, except that the liberalisation calendar will be as follows: one additional nation-wide licence in January 1998; full liberalisation as from 30 November 1998 (3). IRL: None except for public voice telephony and facilities-based service where none as of 1 January 2000.	1. None	

Modes of supply: 1. Cross-border supply 2. Consumption abroad 3. Commercial presence 4. Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	P: None, except for public voice telephony, telex and telegraph where none as from 1 January 2000, and facilities-based services where none as from 1 July 1999. GR: None except for public-voice telephony and facilities-based services where none as of 1 January 2003.		
	2. None	2. None	
	3. None except for [2]: E: none, except that the liberalisation calendar will be as follows: one additional nation wide licence in January 1998; full liberalisation as from 30 November 1998 [3]. IRL: None except for public voice telephony and facilities-based services where none as of 1 January 2000. P: None, except for public voice telephony, telex and telegraph where none as from 1 January 2000 and facilities-based services where none as from 1 July 1999. GR: None except for public voice telephony and facilities-based services where none as of 1 January 2003.	3. None	
	4. Unbound except as indicated in the horizontal section.	4. Unbound except as indicated in the horizontal section.	
o. Other services:			
Mobile and personal communications services and systems	1. None except for: IRL, P: international interconnection of mobile networks with other mobile or fixed networks where none as of 1 January 1999.	1. None	
	2. None	2. None	
	3. None except for: IRL, P: international interconnection of mobile networks with other mobile or fixed networks where none as of 1 January 1999.	3. None	

Modes of supply: 1. Cross-border supply 2. Consumption abroad 3. Commercial presence 4. Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	4. Unbound except as indicated in the horizontal section.	4. Unbound except as indicated in the horizontal section.	

(1) Broadcasting is defined as the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators.
(2) Luxembourg has requested a delayed date for the liberalisation of telecommunications until 1 January 2000. The EC decision on this request is still pending.
(3) Applications for further licences to be received as from 1 August 1998.
(*) Footnote for clarification purposes: Some EC Member States maintain public participation in certain telecommunication operators. EC Member States reserve their rights to maintain such public participation in the future. This is not a market access limitation. In Belgium, government participation and voting rights in Belgacom are freely determined under legislative powers as is presently the case under the law of 21 March 1991 on the reform of government-owned economic enterprises.

ADDITIONAL COMMITMENT BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services underpinning the market access commitments by the European Communities and their Member States.

Definitions

Users mean service consumer and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network and service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A *major supplier* is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

1. COMPETITIVE SAFEGUARDS

1.1. **Prevention of anti-competitive practices in telecommunications**

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2. **Safeguards**

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. INTERCONNECTION

2.1. This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.

2.2. **Interconnection to be ensured**

Within the limits of permitted market access, interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided [1]:

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates [2];

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost construction of necessary additional facilities.

[1] Suppliers of services or networks not generally available to the public, such as closed user groups, have guaranteed rights to connect with the public telecommunications transport network or services on terms, conditions and rates which are non-discrimantory, transparent and cost-oriented. Such terms, conditions and rates may, however, vary from the terms, conditions and rates applicable to interconnection between public telecommunications networks or services.

[2] Different terms, conditions and rates may be set in the Community for operators in different market segments, on the basis of non-discriminatory and transparent national licensing provisions, where such differences can be objectively justified because these services are not considered 'like services'.

2.3. **Public availability of the procedures for interconnection negotiations**

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4. **Transparency of interconnection arrangements**

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5. **Interconnection: dispute settlement**

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time; or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. UNIVERSAL SERVICE

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. PUBLIC AVAILABILITY OF LICENSING CRITERIA

Where a licence is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and

(b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

5. INDEPENDENT REGULATORS

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. ALLOCATION AND USE OF SCARCE RESOURCES

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

DECISION ON COMMITMENTS IN BASIC TELECOMMUNICATIONS

THE COUNCIL FOR TRADE IN SERVICES,

HAVING REGARD to the Annex on negotiations on basic telecommunications,

HAVING REGARD to the results of the negotiations conducted under the terms of the decision on negotiations on basic telecommunications adopted at Marrakesh on 15 April 1994,

ACTING upon the final report of the negotiating group on basic telecommunications,

DECIDES as follows:

1. To adopt the text of the 'Fourth Protocol to the General Agreement on Trade in Services' (hereinafter referred to as the Protocol) and to take note of the schedules of commitments and lists of exemptions from Article II listed in the attachment to the final report of the negotiating group on basic telecommunications.

2. Commencing immediately and continuing until the date of entry into force of the Protocol Members concerned shall, to the fullest extent consistent with their existing legislation and regulations, not take measures which would be inconsistent with their undertakings resulting from these negotiations.

3. During the period from 15 January to 15 February 1997, a Member which has a schedule of commitments annexed to the Protocol, may supplement or modify such schedule or its list of Article II exemptions. Any such Member which has not annexed to the Protocol a list of Article II exemptions may submit such a list during the same period.

4. A Group on basic telecommunications reporting to the Council for Trade in Services shall conduct consultations on the implementation of paragraph 3 above commencing its work no later than 90 days from the adoption of the decision.

5. The Council for Trade in Services shall monitor the acceptance of the Protocol by Members concerned and shall, at the request of a Member, examine any concerns raised regarding the application of paragraph 2 above.

6. Members of the World Trade Organization which have not annexed to the Protocol schedules of commitments or lists of exemptions from Article II may submit, for approval by the Council, schedules of commitments and lists of exemptions from Article II relating to basic telecommunications prior to 1 January 1998.

REPORT OF THE GROUP ON BASIC TELECOMMUNICATIONS

1. This report is made in accordance with paragraph 4 of the Decision on Commitments in Basic Telecommunications, adopted by the Council for Trade in Services on 30 April 1996 (S/L/19). In paragraph 1 of this Decision, the Council also adopted the text of the Fourth Protocol to the General Agreement on Trade in Services and took note of the schedules of commitments and lists of exemptions from Article II listed in the attachment to the final report of the negotiating group on basic telecommunications (S/NGBT/18).

2. The Decision on commitments on basic telecommunications established the Group on Basic telecommunications to 'conduct consultations on the implementation of paragraph 3 of the Decision'. Paragraph 3 states that 'during the period from 15 January to 15 February 1997, a Member which has a schedule of commitments annexed to the Protocol, may supplement or modify such schedule or its list of Article II exemptions' and that 'any such Member which has not annexed to the Protocol a list of Article II exemptions may submit such a list during the same period'.

3. At the Group's first meeting in July 1996, participants suggested that the principal issues before the GBT included the desirability of improving the quantity and quality of schedules offered, and the need to address certain issues which had been left unresolved in April. Subsequently, the Group sponsored frequent rounds of bilateral negotiations on offers and regularly included discussion of outstanding issues in its meetings. In November participants began submitting revised draft offers of commitments on basic telecommunications for consideration. The Group's Report to the Council on Trade in Services (S/GBT/2), which formed part of the Report to the Singapore Ministerial Conference, recommended that Ministers 'stress their commitment to bring the negotiations on basic telecommunications to a successful conclusion by 15 February 1997, urge all WTO Members to strive for significant, balanced and non-discriminatory liberalization commitments on basic telecommunications by that date and recognize the importance of resolving the principal issues before the GBT'. The Declaration adopted by Ministers in Singapore (WT/MIN(96)/DEC) contained a commitment to 'achieve a successful conclusion to the negotiations on basic telecommunications in February 1997'. Ministers also stated 'We are determined to obtain a progressively higher level of liberalization in services on a mutually advantageous basis with appropriate flexibility for individual developing country members, as envisaged in the agreement, in the continuing negotiations and those scheduled to begin no later than 1 January 2000. In this context, we look forward to full MFN agreements based on improved market access commitments and national treatment'.

4. In its discussions on outstanding issues, the Group considered the following matters: ways to ensure accurate scheduling of commitments — particularly with respect to supply of services over satellites and to the management of radio spectrum; potential anti-competitive distortion of trade in international services; the status of intergovernmental satellite organizations in relation to GATS provisions; and the extent to which basic telecommunications commitments include transport of video and/or broadcast signals within their scope.

5. The Chairman issued notes reflecting his understanding of the position reached in discussion of the scheduling of commitments and management of radio spectrum. The first such note set out a number of assumptions applicable to the scheduling of commitments and was intended to assist in ensuring the transparency of commitments (S/GBT/W/2/Rev. 1 of 16 January 1997). The second addressed the allocation of radio spectrum, suggesting that the inclusion of references to the availability of spectrum in schedules was unnecessary and that such references should be deleted (S/GBT/W/3 of 3 February 1997). These notes are attached to this Report.

6. By 15 February 1997 the total number of schedules submitted had reached 55 (counting as one the offer of the European Communities and their Member States). Nine governments had submitted lists of Article II Exemptions.

7. The Group noted that five countries had taken Article II exemptions in respect of the application of differential accounting rates to services and service suppliers of other Members. In the light of the fact that the accounting rate system established under the International Telecommunications Regulations is the usual method of terminating international traffic and by its nature involves differential rates, and in order to avoid the submission of further such exemptions, it is the understanding of the Group that:

   — the application of such accounting rates would not give rise to action by Members under dispute settlement under the WTO, and

   — that this understanding will be reviewed not later than the commencement of the further Round of negotiations on services commitments due to begin not later than 1 January 2000.

8. The Group also recalled paragraph 6 of the Decision of 30 April 1996, which stated that Members of the World Trade Organization which have not annexed to the Protocol schedules of commitments or lists of exemptions from Article II may submit, for approval by the Council, schedules of commitments and lists of exemptions from Article II relating to basic telecommunications prior to 1 January 1998.

9. At its meeting of 15 February 1997, the Group adopted this report and the attached list of the Schedules of Commitments and Lists of Article II Exemptions, which, in accordance with paragraph 3 of the Decision on commitments in basic telecommunications, will be attached to the Fourth Protocol to the General Agreement on Trade in Services in replacement of those attached on 30 April 1996.

NOTE BY THE CHAIRMAN

Revision

It has been suggested by a number of delegations that it might be helpful to produce a brief and simple note on assumptions applicable to the scheduling of commitments in basic telecoms. The purpose of the attached note is to assist delegations in ensuring the transparency of their commitments and to promote a better understanding of the meaning of commitments. This note is not intended to have or acquire any binding legal status.

NOTES FOR SCHEDULING BASIC TELECOM SERVICES COMMITMENTS

1. Unless otherwise noted in the sector column, any basic telecom service listed in the sector column:

   (a) encompasses local, long distance and international services for public and non-public use;

   (b) may be provided on a facilities-basis or by resale; and

   (c) may be provided through any means of technology (e.g., cable [1], wireless, satellites).

2. Subsector (g) — private leased circuit services — involves the ability of service suppliers to sell or lease any type of network capacity for the supply of services listed in any other basic telecom service subsector unless otherwise noted in the sector column. This would include capacity via cable, satellite and wireless network.

3. In view of points 1 and 2 above, it should not be necessary to list cellular or mobile services as a separate subsector. However, a number of Members have done so, and a number of offers have commitments only in these subsectors. Therefore, in order to avoid extensive changes in schedules, it would seem appropriate for Members to maintain separate entries for these subsectors.

[1] Including all types of cable.

CHAIRMAN'S NOTE

Market access limitations on spectrum availability

Many Members have entries in the market access column of their schedules indicating that commitments are 'subject to availability of spectrum/frequency' or similar wording. In light of the physical nature of spectrum and the constraints inherent in its use, it is understandable that Members may have sought to rely on these words to adequately protect legitimate spectrum management policies. There is, however, doubt that words such as 'subject to availability of spectrum/frequency' as listed in the market access column of many Members' schedules achieve that objective.

Spectrum/frequency management is not, *per se*, a measure which needs to be listed under Article XVI. Furthermore under the GATS each Member has the right to exercise spectrum/frequency management, which may affect the number of service suppliers, provided that this is done in accordance with Article VI and other relevant provisions of the GATS. This includes the ability to allocate frequency bands taking into account existing and future needs. Also, Members which have made additional commitment in line with the reference paper on regulatory principles are bound by its paragraph 6.

Therefore, words such as 'subject to availability of spectrum/frequency' are unnecessary and should be deleted from Members' schedules.